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No. 97-16

In the Supreme Court of the United States

OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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Respondents contend that the Forest Service's adoption of the Land and Resource Management Plan (LRMP) for the Wayne National Forest was arbitrary and capricious because the plan allocates insufficient land to "wilderness recreation," by which they appear to mean hiking, camping, or similar activities conducted in a semiprimitive environment largely removed from human contact or evidence of prior human habitation. See, *e.g.*, Resp. Br. 9.[1] Respon-

[1] Respondents' use of the term "wilderness recreation" is at least potentially misleading. The Wilderness Act, 16 U.S.C. 1131-1136, defines the term "wilderness" to include federally owned land meeting specified criteria. 16 U.S.C. 1131(c). The Forest Service concluded that no lands within the Wayne National Forest satisfied the statutory criteria, see Final Environmental Impact Statement (FEIS) 2-65, and respondents have not sought to challenge that conclusion. Respondents use the term "wilderness recreation" to describe activi-

dents' plan-level challenge is not justiciable. If this Court concludes that the Wayne LRMP is subject to judicial review in the context of a facial challenge, the judgment of the court of appeals should be reversed on the merits, since the plan reflects a rational balancing of competing objectives.

I. Respondents' facial challenge to the Wayne LRMP is not justiciable. In contending that the LRMP fails to allocate a sufficient portion of the forest to "wilderness recreation," respondents conflate two distinct objections to the plan. First, respondents argue (and have argued throughout this litigation) that the plan overemphasized timber harvesting at the expense of other uses of the forest, by designating too many acres as suitable for timber harvesting and by setting the maximum allowable sale quantity (ASQ) at too high a level.[2] Second, respondents contend that with the exception of Management Area 6.2 (which comprises approximately 10% of the Wayne National Forest), their enjoyment of the forest will be impaired by a variety of activities *other than* timber harvesting. See, *e.g.*, Resp. Br. 31 (stating that respondents' interests "are harmed by a variety of nonlogging activities approved by the plan's land allocations").[3]

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ties characterized by the Forest Service as "semiprimitive, nonmotorized recreation." See Resp. Br. 44 ("The Forest Service defines areas suitable for wilderness recreation, which it calls 'semi-primitive non-motorized recreation,' as blocks of 2500 acres or more in a predominantly natural environment, where concentrations of users are low, signs of human activity are subtle and infrequent, and motorized use of all roads is prohibited.").

[2] Respondents' complaint asserted both that the Wayne LRMP overemphasized timber harvesting at the expense of other uses of the forest, and that the plan improperly relied on clearcutting as the predominant method of harvesting. See J.A. 19 (alleging that "the plan lacks site-specific determinations that clearcutting is the 'optimal' method of harvesting timber in the Wayne" and that "the plan fails to demonstrate the **optimality** of clearcutting as the method of harvesting timber for the Wayne as a whole"). The court of appeals concluded that the Forest Service's "planning process was improperly predisposed toward clearcutting" and that the agency "would utilize even-aged management logging as if it were the statutory rule," in derogation of a purported statutory requirement that "even-aged management techniques will be used only in exceptional circumstances." Pet. App. 5a, 6a. In this Court, however, respondents appear largely to have abandoned their challenge to the Wayne LRMP's projections concerning the likely *methods* of timber harvesting. See, *e.g.*, Resp. Br. 47 ("This Court need not decide what analysis must be undertaken in a clearcutting optimality determination because the optimality of particular logging methods in various ecological conditions is not at the heart of this case.").

[3] Lands within Management Area 6.2 are not included in the timber base, Plan 4-126, and the plan projects that all roads within those lands will ultimately be closed to motorized traffic. Plan 4-127. Within Management Area 6.2 "[t]here is a high probability of experiencing considerable isolation from the sights and sounds of people, independence, closeness to nature, tranquility, and self-reliance." Plan 4-124. Management Area 6.2 contains 17,217 acres of land, Plan 4-176—approximately 10% of the 176,787 federally owned acres in the Wayne National Forest. Plan 4-180.

Respondents' statement that the Wayne LRMP "protect[ed] only 10% of the forest for undisturbed backcountry use" (Resp. Br. 15) refers to the size of Management Area 6.2; it should not be misconstrued as an assertion that only 10% of the forest was protected from *timber harvesting*. Over 44,000 acres of forest land—*i.e.*, approximately one-fourth of the federally owned land within the Wayne National Forest—were designated by the plan as not suited for timber production. Plan 4-180. And while the Wayne LRMP designated 126,107 acres as suited for timber production, it projected that only 7,835 acres would actually be harvested during the years 1986-1996. *Ibid.*

As we explain below (pp. 4-11, *infra*) and in our opening brief (at 28-30), the plan provisions governing timber harvesting activities in the Wayne National Forest are not subject to judicial review in the context of a facial challenge to the plan itself, since they neither require nor authorize the Forest Service to undertake any timber harvesting project without a further, individualized assessment of its likely consequences. Respondents' contention that their use of the Wayne National Forest is impaired by *non*-logging activities is not properly before this Court, since respondents did not advance that argument in the courts below.[4]

A. The National Forest Management Act of 1976 (NFMA) requires the Forest Service, in developing LRMPs for units of the National Forest System, to identify lands "not suited for timber production." 16

[4] As the Forest Service recognized in developing the Wayne LRMP, the desire to make semiprimitive recreation available must be balanced against many competing uses of the Forest—including competing recreational uses having nothing to do with timber production. See Plan 3-2 ("Competing demands for space by a variety of forest users such as horse riders, hikers, off-road vehicle riders, hunters, mushroom and berry pickers, and solitude seekers make it difficult to get away from other forest users."). Forest Service decisions regarding the mix of recreational opportunities that will be available in a particular unit may have important consequences for forest users, and those decisions may well be subject to judicial review in appropriate proceedings. It should be emphasized, however, that individuals who oppose timber harvesting may differ widely in their preferences regarding the desired range of alternative forest uses. As we explain below, respondents have not previously contended in this case that activities other than timber harvesting impair their enjoyment of the Wayne National Forest. Respondents' effort to expand their challenge to encompass an array of non-logging activities is an attempt to transform this into a fundamentally different lawsuit.

U.S.C. 1604(k); see 36 C.F.R. 219.14. The Wayne LRMP identified 126,107 out of 176,787 acres within the forest as suited for timber production. Plan 4-180; see note 3, *supra*. The Forest Service set the maximum allowable sale quantity (ASQ) at an average of 7.5 million board feet per year (*i.e.*, 75 million board feet total) during the first decade of the plan. Plan 4-10; Record of Decision (ROD) 18. For a variety of reasons, those determinations are not ripe for review in the context of a facial challenge to the plan.

1. The plan projections concerning the aggregate quantity of timber that would be harvested—whether expressed in terms of acreage on which timber may be offered for sale or in terms of board feet that may be offered—are not binding on the Forest Service; they are subject to change over the life of the plan. In rejecting the administrative appeal filed by respondent Citizens Council in this case, the Chief of the Forest Service emphasized that the "ASQ in the Forest Plan is the upper limit for timber outputs for the plan period, not actual proposals for timber sales offerings. The Forest Plan makes no promise or assurance that the outputs for any resource, including timber, will actually occur at the projected level." Pet. App. 100a. That authoritative interpretation of the Wayne LRMP is consistent with prior agency pronouncements, see, *e.g.*, 53 Fed. Reg. 26,832 (1988) (ASQ "is the maximum regulated volume of timber that can be sold over the planning period, not necessarily the volume that will be sold"), and is entitled to deference from a reviewing court. See also Pet. App. 33a (district court observes that "[t]he ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors").

2. The Wayne LRMP leaves the Forest Service substantial discretion to determine not only the aggregate quantity of timber that should be offered for sale, but also the locations within the forest in which harvesting will occur. Although the plan designated 126,107 acres within the forest as suited for timber production, it projected that only 7,835 acres would be harvested in the years 1986-1996, and that 11,138 acres would be harvested in the years 1996-2005. Plan 4-180. Thus, even under the projections contained in the Wayne LRMP, the large majority of suitable timber land would not actually be harvested during the life of the plan, since the Forest Service is required by the NFMA to develop a revised plan within 15 years after the LRMP's adoption in 1988. See 16 U.S.C. 1604(f)(5) (forest plans must be revised "at least every fifteen years," and the revision process must include a level of "public involvement comparable to that required" for the promulgation of a new plan).

Unless timber is actually harvested at a particular site, the mere designation of that tract as "suited for timber production" has no real-world, on-the-ground effect on the use and enjoyment of the land by respondents' members or others. As the district court observed, "[i]f the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur." Pet. App. 37a. The resources of the courts and the Forest Service should not be expended on litigation concerning the suitability of lands the large majority of which would not have been harvested during the plan period in any event.

3. Finally, even if it were possible to determine from the Wayne LRMP precisely where the Forest Service intended to offer timber sales during the life of the plan, it would not make sense to litigate the question whether that land is "suited for timber production" in the context of a facial challenge to the LRMP itself. The factors bearing on the propriety of timber harvesting at a particular location may change, or new information may come to light, during the time between the adoption of the plan and the proposed sale. By requiring that judicial review occur in the context of a particular timber sale proposal, the courts can ensure that the propriety of the sale is assessed on the basis of current and complete information pertaining to the sale. That approach properly channels the energies of the agency and the courts into the concrete determination whether particular timber harvesting activities are actually appropriate, and away from the preliminary (and more abstract) determination whether various tracts are "suited" for harvesting.[5]

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[5] In affirming the Regional Forester's decision to adopt the Wayne LRMP, the Chief of the Forest Service observed that even where particular tracts have been designated as suited for timber production, the agency will conduct a site-specific analysis to determine whether harvesting should actually go forward. "For each proposed sale," the Chief explained, "a no action alternative, which has no timber harvesting, is also considered." Pet. App. 70a. The agency's decision to adopt a "no action" alternative at a particular site need not result in an amendment to the plan, or in a formal determination that the relevant parcel is "not suited for timber production." In that sense it may be accurate to say that the Forest Service's site-specific analysis will not involve a reassessment of the prior suitability determination. In determining whether a particular sale should go forward, however, the Forest Service remains free to reconsider, in light of any new evidence or changed

In the instant case, respondents alleged that the Wayne LRMP had arbitrarily designated as suitable for timber production lands that could be harvested only at a financial loss to the government. See J.A. 18. The ROD for the Wayne LRMP stated in general terms that "the overall timber sale program is expected to provide a positive cash revenue to the Forest," but acknowledged that the revenue realized by some sales contemplated by the plan would likely be less than "the cost to the U.S. in preparing and administering the sales." ROD 21. The Forest Service stated, however, that such "below cost" timber sales could provide a variety of nonmonetary public benefits. The agency explained, for example, that timber sales can "provide open area for vistas and a

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circumstances, the subsidiary factors that initially informed the plan-level suitability finding.

In any event, an agency decision is not rendered ripe for judicial review simply because some aspects of that decision will not be subject to agency reexamination in a subsequent proceeding. An agency adjudicator who applies a regulation to a particular set of facts is not authorized to reassess the question whether the regulation reflects a permissible or appropriate implementation of the governing statute. This Court has nevertheless held that, absent a contrary statutory directive (see Gov't Br. 20 n.14), "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA" until it has been applied to a concrete factual setting. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). After the agency adjudicator applies the regulation (and any other relevant legal standards) to a concrete factual setting, the final decision in that adjudicatory proceeding will be subject to judicial review. At that point, the court can consider the validity of the regulation (if it ultimately played a decisive role in the agency adjudicator's decision), as well as any other legal issues that the plaintiff raised before the agency. See, *e.g.*, *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57-61 (1993).

greater diversity in the landscape," and that "[a] variety of wildlife habitats are provided by a diversity of timber stand age classes and tree species." *Ibid.* The Forest Service concluded that "[i]f the visual, wildlife, and recreation benefits were added to the returns to the Treasury, timber sale benefits would substantially exceed the costs." *Ibid.* Respondents challenge that analysis, arguing that "the Forest Service arbitrarily placed a high value on wildlife and recreational opportunities that thrive as a result of logging without considering the costs of these activities to recreation and wildlife that depend on undisturbed forest." Resp. Br. 43.[6]

For the reasons stated at pages 14-19, *infra*, the Forest Service did not act in an arbitrary or capricious manner in assessing the likely advantages and disadvantages of below cost sales. The crucial point, however, is that in the context of an individual timber sale proposal, the agency can assess, on the basis of current, site-specific information, the anticipated monetary and nonmonetary costs and benefits of harvesting at a particular location. Judicial review (reflecting appropriate deference to the agency's resolution of disputed scientific and policy questions) will also be more focused and better informed: The question whether the Forest Service has rationally

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[6] Neither the Forest Service's discussion of below-cost timber sales nor respondents' complaint focuses on specific tracts of land. The LRMP and its supporting documents do not identify particular sites at which below cost sales are likely to be appropriate. Respondents' challenge to the plan's suitability determinations rests on a generalized attack on the agency's overall methodology; respondents have not identified sites that they believe to have been wrongly designated as suited for timber production. Compare ROD 21 with J.A. 19-21; Resp. Br. 43.

assessed the costs and benefits of a specific timber sale at a particular time and place is far more susceptible of intelligent judicial resolution than is any abstract inquiry into the general advantages and disadvantages of harvesting.

4. Respondents also assert that "[a]s with facial challenges to zoning ordinances, a challenge to the validity of a forest plan's entire multiple use determination is fit for review when the plan is adopted." Resp. Br. 20. This Court has made clear, however, that a facial challenge to a zoning ordinance is appropriate only insofar as it is alleged that the "mere enactment" of the ordinance inflicts a constitutionally impermissible injury upon the plaintiff. See *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 (1997) ("the only issue justiciable" prior to the application of a zoning ordinance to a particular parcel is "whether mere enactment of the statute amounted to a taking"); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (facial challenge to zoning ordinance was proper where plaintiff alleged that "the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses"). Respondents do not and could not contend that the "mere enactment" of either the ASQ or the suitability determinations contained in the Wayne LRMP affected the ability of particular members to use and enjoy specific parts of the National Forest. Judicial review of the plan's programmatic guidance concerning timber harvesting activities is therefore appropriate only when that guidance is applied to particular sales. Compare *Suitum*, 117 S. Ct. at 1666 ("where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim").

B. For the reasons stated above, the availability of administrative and judicial review of individual timber sale decisions fully protects respondents against the danger that their enjoyment of the Wayne National Forest will be impaired by arbitrary or unlawful timber harvesting. In contending that their plan-level challenge is justiciable, respondents rely heavily on the assertion that their ability to enjoy the forest (outside Management Area 6.2) will be "harmed by a variety of *non-logging* activities approved by the plan's land allocations, such as motorized recreation, herbicide use, grazing, utility pole corridors, road-building, and maintenance regimes, as well as by the plan's failure to direct more road closures to promote undisturbed backcountry recreation." Resp. Br. 31 (emphasis added); see also, *e.g.*, *id.* at 15 (outside Management Area 6.2, "the plan mandates no affirmative steps, like closing all non-essential roads, to promote wilderness recreation"). The thrust of that argument is that respondents' members are currently injured by those activities, independent of any harm they may suffer as a result of timber harvesting, and that the propriety of those activities cannot readily be determined in the context of a challenge to an individual timber sale.

Respondents' argument is not properly before this Court, since it was neither raised in nor addressed by the courts below. Respondents' complaint focused exclusively on the LRMP provisions concerning timber harvesting. Respondents alleged that their "[m]embers visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging of trees," J.A. 13, and they requested "a prelimi-

nary and permanent injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan has been revised in accordance with law," J.A. 26. See also J.A. 19 (listing reasons that the Wayne LRMP is alleged to be arbitrary and capricious). Respondents did not contest in the lower courts the propriety of the "non-logging" activities they now identify in their brief in this Court, and neither of the courts below addressed those activities. The affidavits submitted by respondents to the district court on remand in August 1997 (see Gov't Br. 14, 42 n.31; Resp. Br. 13-14) likewise failed to identify any ongoing non-logging activities that they alleged were interfering with the ability of respondents' members to enjoy the Wayne National Forest.[7]

Respondents' catalogue (see Resp. Br. 31) of purportedly harmful non-logging activities, it should be noted, implicates two very different types of plan-level provisions. The LRMP's projections concerning possible *future* ground-disturbing activities (*e.g.*, "roadbuilding") are unripe for facial challenge for the same reason that the plan's timber harvesting provisions are unripe for immediate review. Rather, a person

[7] Respondents' complaint did allege that the timber harvesting contemplated by the Wayne LRMP would necessitate the construction of new roads, and that the road construction process would cause environmental damage. See J.A. 16, 17. That damage was treated in respondents' complaint as one of the deleterious consequences of timber harvesting; respondents did not challenge, or seek injunctive relief against, road construction as such. In any event, any facial challenge to the Wayne LRMP's road*building* provisions would have been unripe. See pp. 12-13, *infra*. Respondents' complaint contains no reference to the agency's purported failure to close existing roads. See p. 13, *infra*.

who would be injured by a particular roadbuilding project may file suit to challenge that project if and when it becomes imminent, after first exhausting available administrative remedies. See Gov't Br. 35. By contrast, a forest plan's "failure to direct more road closures to promote undisturbed backcountry recreation" (Resp. Br. 31) might well be subject to immediate judicial review, assuming that the plaintiff has satisfied exhaustion requirements and can demonstrate that his enjoyment of the forest is impaired by the agency's failure to close specified roads. The Forest Service's refusal to halt or curtail existing uses of public lands—unlike its projection that timber harvesting or similar site-specific activities will occur at some point in the future—may properly be characterized as a decision having an immediate on-the-ground effect.

However, neither respondents' complaint nor its briefs in the lower courts challenged the Forest Service's failure to include in the plan itself any provision for closing existing roads within the Wayne National Forest. Nor did respondents challenge the failure of the plan to bar any other existing uses of the forest that impaired the ability of identified members to use the land for competing recreational activities. Their challenge has instead been directed exclusively at the LRMP's projections concerning anticipated *future* timber harvesting activities. For the reasons stated above and in our opening brief, that challenge is not ripe for judicial review.

C. Respondents' claim of standing is flawed for substantially the same reasons. Insofar as respondents claim that their members suffer injury as a result of non-logging activities, their claim is not properly before this Court. Insofar as respondents' challenge is directed to the Wayne LRMP's timber

harvesting provisions, respondents have failed to demonstrate that the adoption of those provisions caused present or imminent injury to identified members. Because the plan did not commit the Forest Service to offer timber sales in any particular quantity or at any particular location (much less do so without offering an opportunity for a site-specific administrative and judicial challenge), it was unclear at the time of the plan's adoption whether any tracts utilized by particular members of the respondent organizations would ultimately be affected by timber harvesting activities.[8] And because each timber sale that does occur will be preceded by an individualized assessment of its likely costs and benefits, any injury that respondents' members may ultimately suffer as a result of those harvests would not be "fairly traceable," *Bennett* v. *Spear*, 117 S. Ct. 1154, 1161 (1997), to the plan itself. See Gov't Br. 22-24.[9]

II. Respondents contend that the Wayne LRMP is arbitrary and capricious because it designates an ex-

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[8] As respondents point out (see Resp. Br. 16; see also Gov't Br. 32 n.24), the Forest Service undertook a substantial number of timber harvesting projects in the years between its adoption of the Wayne LRMP and the filing of respondents' complaint. Respondents' failure to file suit to challenge any of those timber sales undermines any suggestion that any one of their members' use of and interest in the Wayne National Forest is so broad and encompassing that that member can be expected to suffer injury *whenever* timber is harvested within the forest.

[9] As we explain above (see p. 6, *supra*), the Wayne LRMP projected that only a small percentage of the suitable acreage would be harvested by the year 2005. With respect to any logging that may occur after that date, the causal link between the LRMP and a particular timber harvest will be broken not only by the agency's site-specific analysis of the individual sale, but by the statutorily required revision of the plan after 15 years.

cessive quantity of land as suitable for timber harvesting and fails to set aside sufficient acreage for "wilderness" recreation. They argue that the Wayne LRMP made timber harvesting "the dominant tool for implementing the plan," Resp. Br. 43, and that the agency "ignor[ed] public demand for wilderness and the prevalence of game species and hunting in the region," *id.* at 41. Those contentions are without merit.

A. As we explain above (see p. 6, *supra*), the Wayne LRMP projected that only 7,835 (out of 176,787 federally owned) acres would be harvested during the years 1986-1996, and that a total of 18,973 acres would be harvested during the years 1986-2005, by which time the Forest Service will have been required by NFMA to develop a revised plan. See also ROD 3 ("Trees will be harvested on about 1/2 percent of the Forest each year."). Those projections belie respondents' characterization of timber harvesting as "the dominant tool for implementing the plan." Resp. Br. 43. The Forest Service set the ASQ at an average of 7.5 million board feet per year for the first decade of the plan (see p. 5, *supra*), despite the agency's conclusion that "[u]nder current market conditions, the timber industry could use 18.4 [million board feet] of volume per year in the first decade." ROD 19. That decision further refutes any suggestion that other uses of the forest were subordinated to the goal of maximizing timber production.

B. Respondents also contend that the Forest Service "ignor[ed] public demand for wilderness" and "assume[d] that logging would provide unmitigated benefits." Resp. Br. 41, 45. Those assertions are entirely without basis. In adopting the Wayne LRMP, the agency explained that Management Area 6.2, which emphasizes "natural forest" conditions and opportunities for semiprimitive recreation, had been in-

creased from 11,187 acres in the proposed plan to 17,217 acres in the final plan in response to comments from the public. ROD 6, 11, 33, 34. All land within Management Area 6.2 was designated as "not suited for timber production" as a result of its allocation for "natural forest." ROD 20; Plan 4-176.

The Forest Service acknowledged that management of the Wayne National Forest in accordance with the 1988 LRMP would not satisfy the full public demand for semiprimitive recreational opportunities. See ROD 29 ("The Forest Plan meets 50 percent of the demand for [semiprimitive, nonmotorized] recreation in the first decade."). The agency explained, however, that its "capability to fulfill the public's recreation expectations [wa]s limited by a number of factors." Plan 3-2. It observed that "[t]he Forest's scattered land ownership pattern and the difficulty in closing the high density of public roads limit the possibilities for recreation environments which are largely unaffected by human activities." *Ibid.* The Forest Service also noted that competing recreational demands "make it difficult to get away from other forest users." *Ibid*; see also ROD 29 (stating that dedication of land to semiprimitive, nonmotorized recreation lowers cost efficiency "because fewer people will visit the area once the roads are closed"); note 4, *supra*.

Contrary to respondents' apparent contention, the Forest Service did not act in an arbitrary or capricious manner by failing to satisfy the entire demand for a specific use of public lands. The Forest Service did not "ignore" the public desire for semiprimitive recreation; it simply struck the balance between that form of recreation and competing uses of the Wayne National Forest as a whole in a different manner than respondents would prefer. The Forest Service's designation of suitable timber lands reflected a rational balancing of competing objectives and was well within the agency's broad discretion under the NFMA and forest planning regulations. Compare, *e.g.*, *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (where determination of relevant decisionmaking criteria "necessarily require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns[,] * * * courts appropriately defer to the agency entrusted by Congress to make such policy determinations"); *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981).[10]

C. As we explain above (see pp. 8-9, *supra*), the Forest Service in adopting the Wayne LRMP anticipated that below-cost timber sales would sometimes be advisable, in part because "[a] variety of wildlife habitats are provided by a diversity of timber stand age classes and tree species." ROD 21; see also FEIS 2-16 ("Wildlife biologists agree that Forest openings created by clearcutting significantly increase the vegetative diversity of the Forest and its ability to

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[10] Respondents assert that "[a]s a result of over-emphasizing logging and under-emphasizing wilderness recreation, only 10% of the forest is designated for undisturbed wilderness recreation. Conversely, five of the largest management areas, covering over 75% of the forest, are designated for off-road vehicle use and/or even-aged logging." Resp. Br. 46. Respondents' statistical comparison rests on the premise that entire management areas were "designated" for timber harvesting, even though the LRMP projected that logging would occur during the plan period on only a small percentage of the land within each management area. In fact, the acreage (17,217) contained within Management Area 6.2 closely approximates the acreage (18,973) projected to be harvested throughout the forest during the years 1986-2005. Plan 4-176, 4-180.

support a wide range of wildlife species.").[11] The agency observed that "[a]s 'recreationists', hunters benefit from increases in game populations due to habitat improvements obtained through timber harvest by the clearcutting method." FEIS 2-16. Respondents contend that the Forest Service "ignored the extent to which existing conditions already satisfy demand for various types of nonwilderness recreation." Resp. Br. 45.

Contrary to respondents' assertion, the Forest Service considered the existing uses of surrounding lands in identifying the areas within the Wayne National Forest that would potentially be subject to timber harvesting. See Pet. App. 45a (district court states that although the Forest Service "is not required to compensate for [surrounding areas] in the Forest Plan * * *, the forest planners did consider the area surrounding the Wayne"). The agency's decision to increase the size of Management Area 6.2 (as

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[11] The Forest Service further explained:

> Areas harvested by clearcutting regenerate rapidly and within 8 to 10 years are filled with regeneration 20 to 30 feet tall. By the time they are 20 years old, most people do not realize that they were even clearcut. At any time, the amount of the Forest with an "open canopy" from clearcutting will be less than 10 percent even in Management Areas 3.1 and 3.2. The open area greatly increases the capacity of the Forest to support some species of wildlife.

FEIS 2-23 (quoted at Pet. App. 23a) (district court opinion). Thus, the thrust of the agency's analysis was not that timber harvesting should be used as a "means to convert mature forest into pasture." Resp. Br. 43. Rather, the agency concluded that the diversity of wildlife within the Wayne National Forest could be substantially enhanced by the creation of temporary clearings that would comprise (at any given time) a small percentage of the forest as a whole.

compared to the proposed plan) was made partly in response to comments noting the relative dearth of "natural forest," and the relative abundance of early successional habitat, in the areas surrounding the National Forest. See FEIS 2-24 to 2-29.[12] For essentially the same reasons, the Forest Service determined that no new wildlife developments (such as openings and impoundments) should be constructed, and existing developments should be removed, within Management Area 6.2. See ROD 16 (deciding not to utilize wildlife developments in Management Area 6.2, based on the view of many commenters that "the existing, abundant, open, agricultural, and young timber forests on State and private lands provided adequate early-successional habitat"); FEIS 2-28, 2-40. Although respondents would have preferred that the Forest Service place even greater emphasis on the preservation of "natural forest" conditions, the record does not support their contention that the agency acted in an arbitrary or capricious manner or ignored conditions on surrounding lands.[13]

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[12] By contrast, "[o]ther commenters wanted more early-successional habitat in order to increase or maintain populations of some species, such as ruffed grouse." ROD 15. Thus, the agency did not ignore a unanimous public sentiment favoring preservation of "natural forest" conditions; rather, it balanced competing objectives and public preferences in a manner well within its broad sphere of discretion.

[13] On February 11, 1998, the Forest Service issued a non-significant amendment to the Wayne LRMP. We have lodged a copy of that amendment with the Clerk of this Court. The amendment contains two tables. The first gives statistics (listed in annual averages) regarding the aggregate volumes of hardwood, pine, and total timber actually sold in the Wayne National Forest during the period 1988-1997 and the aggregate volumes projected to be sold during the period 1998-2002. The second provides statistics concerning the methods of harvesting

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss on the ground that respondents' suit is unripe and therefore nonjusticiable. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1998

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employed in the Wayne National Forest during the years 1988-1997. The Decision Notice explains that the purpose of the amendment is to eliminate possible public confusion concerning the agency's actual management practices in the Wayne National Forest. See Decision Notice at 1, 3, 5.

The plan amendment does not affect the issues before this Court or render this case moot. The amendment does not alter the ASQ, the designation of land suitable for timber harvesting, the management area designations, or the standards and guidelines contained in the Wayne LRMP. Decision Notice at 2, 4. Although the amendment does make clear that the type and volume of timber harvesting activities in the Wayne National Forest have been substantially different from those initially projected in the plan, that fact had previously been made clear in Forest Service documents and was known to the Court at the time it granted the petition for a writ of certiorari. See Gov't Br. in Opp. 16-17. The Supervisor for the Wayne National Forest, in August of last year, had announced his intention to adopt a non-significant plan amendment to bring plan projections into conformity with actual experience since 1988. See Letter from José A. Zambrana (Aug. 29, 1997) (quoted in Gov't Br. in Opp. 21).